

assuring consultant compliance with the Federal cost principles in accordance with § 172.11;

(11) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(12) Monitoring the consultant's work and compliance with the terms, conditions, and specifications of the contract;

(13) Preparing a consultant's performance evaluation when services are completed and using such performance data in future evaluation and ranking of consultant to provide similar services;

(14) Closing-out a contract;

(15) Retaining supporting programmatic and contract records, as specified in 2 CFR 200.333 and the requirements of this part;

(16) Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract;

(17) Assessing administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and providing for such sanctions and penalties as may be appropriate; and

(18) Resolving disputes in the procurement, management, and administration of engineering and design related consultant services.

(d) A contracting agency may formally adopt, by statute or within approved written policies and procedures as specified in paragraph (c) of this section, any direct Federal Government or other contracting regulation, standard, or procedure provided its application does not conflict with the provisions of 23 U.S.C. 112, the requirements of this part, and other laws and regulations applicable to the FAHP.

(e) Notwithstanding paragraph (d) of this section, a contracting agency shall have a reasonable period of time, not to exceed 12 months from the effective date of this rule unless an extension is granted for unique or extenuating circumstances, to issue or update current

written policies and procedures for review and approval in accordance with paragraph (c) of this section and consistent with the requirements of this part.

§ 172.7 Procurement methods and procedures.

(a) *Procurement methods.* The procurement of engineering and design related services funded by FAHP funds and related to a highway construction project subject to the provisions of 23 U.S.C. 112(a) shall be conducted in accordance with one of three methods: Competitive negotiation (qualifications-based selection) procurement, small purchases procurement for small dollar value contracts, and non-competitive procurement where specific conditions exist allowing solicitation and negotiation to take place with a single consultant.

(1) *Competitive negotiation (qualifications-based selection).* Except as provided in paragraphs (a)(2) and (3) of this section, contracting agencies shall use the competitive negotiation method for the procurement of engineering and design related services when FAHP funds are involved in the contract, as specified in 23 U.S.C. 112(b)(2)(A). The solicitation, evaluation, ranking, selection, and negotiation shall comply with the qualifications-based selection procurement procedures for architectural and engineering services codified under 40 U.S.C. 1101-1104, commonly referred to as the Brooks Act. In accordance with the requirements of the Brooks Act, the following procedures shall apply to the competitive negotiation procurement method:

(i) *Solicitation.* The solicitation process shall be by public announcement, public advertisement, or any other public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Procurement procedures may involve a single step process with issuance of a request for proposal (RFP) to all interested consultants or a multiphase process with issuance of a request for statements or letters of interest or qualifications (RFQ) whereby responding consultants are ranked based on qualifications and a RFP is

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then provided to three or more of the most highly qualified consultants. Minimum qualifications of consultants to perform services under general work categories or areas of expertise may also be assessed through a prequalification process whereby annual statements of qualifications and performance data are encouraged. Regardless of any process utilized for prequalification of consultants or for an initial assessment of a consultant's qualifications under a RFQ, a RFP specific to the project, task, or service is required for evaluation of a consultant's specific technical approach and qualifications.

(ii) *Request for proposal (RFP).* The RFP shall provide all information and requirements necessary for interested consultants to provide a response to the RFP and compete for the solicited services. The RFP shall:

(A) Provide a clear, accurate, and detailed description of the scope of work, technical requirements, and qualifications of consultants necessary for the services to be rendered. To the extent practicable, the scope of work should detail the purpose and description of the project, services to be performed, deliverables to be provided, estimated schedule for performance of the work, and applicable standards, specifications, and policies;

(B) Identify the requirements for any discussions that may be conducted with three or more of the most highly qualified consultants following submission and evaluation of proposals;

(C) Identify evaluation factors including their relative weight of importance in accordance with paragraph (a)(1)(iii) of this section;

(D) Specify the contract type and method(s) of payment anticipated to contract for the solicited services in accordance with § 172.9;

(E) Identify any special provisions or contract requirements associated with the solicited services;

(F) Require that submission of any requested cost proposals or elements of cost be in a concealed format and separate from technical/qualifications proposals, since these shall not be considered in the evaluation, ranking, and selection phase; and

(G) Provide an estimated schedule for the procurement process and establish a submittal deadline for responses to the RFP that provides sufficient time for interested consultants to receive notice, prepare, and submit a proposal, which except in unusual circumstances shall be not less than 14 calendar days from the date of issuance of the RFP.

(iii) *Evaluation factors.* (A) Criteria used for evaluation, ranking, and selection of consultants to perform engineering and design related services must assess the demonstrated competence and qualifications for the type of professional services solicited. These qualifications-based factors may include, but are not limited to, technical approach (e.g., project understanding, innovative concepts or alternatives, quality control procedures), work experience, specialized expertise, professional licensure, staff capabilities, workload capacity, and past performance.

(B) Price shall not be used as a factor in the evaluation, ranking, and selection phase. All price or cost related items which include, but are not limited to, cost proposals, direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as evaluation criteria.

(C) In-State or local preference shall not be used as a factor in the evaluation, ranking, and selection phase. State licensing laws are not preempted by this provision and professional licensure within a jurisdiction may be established as a requirement for the minimum qualifications and competence of a consultant to perform the solicited services.

(D) The following nonqualifications-based evaluation criteria are permitted under the specified conditions and provided the combined total of these criteria do not exceed a nominal value of 10 percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection:

(I) A local presence may be used as a nominal evaluation factor where appropriate. This criteria shall not be based on political or jurisdictional boundaries and may be applied on a project-by-project basis for contracts where a need has been established for a consultant to provide a local presence, a local

presence will add value to the quality and efficiency of the project, and application of this criteria leaves an appropriate number of qualified consultants, given the nature and size of the project. If a consultant from outside of the locality area indicates as part of a proposal that it will satisfy the criteria in some manner, such as establishing a local project office, that commitment shall be considered to have satisfied the local presence criteria.

(2) The participation of qualified and certified Disadvantaged Business Enterprise (DBE) subconsultants may be used as a nominal evaluation criterion where appropriate in accordance with 49 CFR part 26 and a contracting agency's FHWA-approved DBE program.

(iv) *Evaluation, ranking, and selection.*

(A) The contracting agency shall evaluate consultant proposals based on the criteria established and published within the public solicitation.

(B) Although the contract will be with the consultant, proposal evaluations shall consider the qualifications of the consultant and any subconsultants identified within the proposal with respect to the scope of work and established criteria.

(C) The contracting agency shall specify in the RFP discussion requirements that shall follow submission and evaluation of proposals and based on the size and complexity of the project or as defined in contracting agency written policies and procedures, as specified in §172.5(c). Discussions, as required by the RFP, may be written, by telephone, video conference, or by oral presentation/interview and shall be with at least three of the most highly qualified consultants to clarify the technical approach, qualifications, and capabilities provided in response to the RFP.

(D) From the proposal evaluation and any subsequent discussions which may have been conducted, the contracting agency shall rank, in order of preference, at least three consultants determined most highly qualified to perform the solicited services based on the established and published criteria. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is

determined that the solicitation did not contain conditions or requirements that arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re-compete under a new solicitation as specified in paragraph (a)(3)(iii)(C) of this section.

(E) Notification must be provided to responding consultants of the final ranking of the three most highly qualified consultants.

(F) The contracting agency shall retain supporting documentation of the solicitation, proposal, evaluation, and selection of the consultant in accordance with this section and the provisions of 2 CFR 200.333.

(v) *Negotiation.* (A) The process for negotiation of the contract shall comply with the requirements codified in 40 U.S.C. 1104(b) for the order of negotiation.

(B) *Independent estimate.* Prior to receipt or review of the most highly qualified consultant's cost proposal, the contracting agency shall prepare a detailed independent estimate with an appropriate breakdown of the work or labor hours, types or classifications of labor required, other direct costs, and consultant's fixed fee for the defined scope of work. The independent estimate shall serve as the basis for negotiation.

(C) The contracting agency shall establish elements of contract costs (e.g., indirect cost rates, direct salary or wage rates, fixed fee, and other direct costs) separately in accordance with §172.11. The use of the independent estimate and determination of cost allowance in accordance with §172.11 shall ensure contracts for the consultant services are obtained at a fair and reasonable cost, as specified in 40 U.S.C. 1104(a).

(D) If concealed cost proposals were submitted in conjunction with technical/qualifications proposals, the contracting agency may consider only the cost proposal of the consultant with which negotiations are initiated. Due to the confidential nature of this data, as specified in 23 U.S.C. 112(b)(2)(E),

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concealed cost proposals of unsuccessful consultants may be disposed of in accordance with written policies and procedures established under § 172.5(c).

(E) The contracting agency shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract in accordance with the provisions of 2 CFR 200.333. This documentation shall include the consultant cost certification and documentation supporting the acceptance of the indirect cost rate to be applied to the contract, as specified in § 172.11(c).

(2) *Small purchases.* The contracting agency may use the State's small purchase procedures that reflect applicable State laws and regulations for the procurement of engineering and design related services provided the total contract costs do not exceed the Federal simplified acquisition threshold (as defined in 48 CFR 2.101). When a lower threshold for use of small purchase procedures is established in State law, regulation, or policy, the lower threshold shall apply to the use of FAHP funds. The following additional requirements shall apply to the small purchase procurement method:

(i) The scope of work, project phases, and contract requirements shall not be broken down into smaller components merely to permit the use of small purchase procedures.

(ii) A minimum of three consultants are required to satisfy the adequate number of qualified sources reviewed. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements which arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to re compete under a new solicitation as specified in § 172.7(a)(3)(iii)(C).

(iii) Contract costs may be negotiated in accordance with State small purchase procedures; however, the allowability of costs shall be determined

in accordance with the Federal cost principles.

(iv) The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold is ineligible for Federal-aid funding. The FHWA may withdraw all Federal-aid from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

(3) *Noncompetitive.* The following requirements shall apply to the noncompetitive procurement method:

(i) A contracting agency may use its own noncompetitive procedures that reflect applicable State and local laws and regulations and conform to applicable Federal requirements.

(ii) A contracting agency shall establish a process to determine when noncompetitive procedures will be used and shall submit justification to, and receive approval from FHWA before using this form of contracting.

(iii) A contracting agency may award a contract by noncompetitive procedures under the following limited circumstances:

(A) The service is available only from a single source;

(B) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or

(C) After solicitation of a number of sources, competition is determined to be inadequate.

(iv) Contract costs may be negotiated in accordance with contracting agency noncompetitive procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(b) *Additional procurement requirements—*(1) *Uniform administrative requirements, cost principles and audit requirements for Federal awards.* (i) STAs or other recipients and their subrecipients shall comply with procurement requirements established in State and local laws, regulations, policies, and procedures that are not addressed by or are not in conflict with applicable Federal laws and regulations, as specified in 2 CFR part 1201.

(ii) When State and local procurement laws, regulations, policies, or

procedures are in conflict with applicable Federal laws and regulations, a contracting agency shall comply with Federal requirements to be eligible for Federal-aid reimbursement of the associated costs of the services incurred following FHWA authorization, as specified in 2 CFR 200.102(c).

(2) *Disadvantaged Business Enterprise (DBE) program.* (i) A contracting agency shall give consideration to DBE consultants in the procurement of engineering and design related service contracts subject to 23 U.S.C. 112(b)(2) in accordance with 49 CFR part 26. When DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved in accordance with a contracting agency's FHWA approved DBE program through either:

(A) Use of an evaluation criterion in the qualifications-based selection of consultants, as specified in § 172.7(a)(1)(iii)(D); or

(B) Establishment of a contract participation goal.

(ii) The use of quotas or exclusive set-asides for DBE consultants is prohibited, as specified in 49 CFR 26.43.

(3) *Suspension and debarment.* A contracting agency shall verify suspension and debarment actions and eligibility status of consultants and subconsultants prior to entering into an agreement or contract in accordance with 2 CFR part 1200 and 2 CFR part 180.

(4) *Conflicts of interest.* (i) A contracting agency shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of engineering and design related services contracts under this part and governing the conduct and roles of consultants in the performance of services under such contracts to prevent, identify, and mitigate conflicts of interest in accordance with 2 CFR 200.112, 23 CFR 1.33 and the provisions of this paragraph (b)(4).

(ii) No employee, officer, or agent of the contracting agency shall participate in selection, or in the award or administration of a contract supported by Federal-aid funds if a conflict of interest, real or apparent, would be in-

involved. Such a conflict arises when there is a financial or other interest in the consultant selected for award by:

(A) The employee, officer, or agent;

(B) Any member of his or her immediate family;

(C) His or her partner; or

(D) An organization that employs or is about to employ any of the above.

(iii) The contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements. A contracting agency may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.

(iv) A contracting agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(v) To the extent permitted by State or local law or regulations, the standards of conduct required by this paragraph shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the contracting agency's officers, employees, or agents, or by consultants or their agents.

(vi) A contracting agency shall promptly disclose in writing any potential conflict of interest to FHWA.

(5) *Consultant services in management support roles.* (i) When FAHP funds participate in a consultant services contract, the contracting agency shall receive approval from FHWA, or the recipient as appropriate, before utilizing a consultant to act in a management support role for the contracting agency; unless an alternate approval procedure has been approved. Use of consultants in management support roles does not relieve the contracting agency of responsibilities associated with the use of FAHP funds, as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4) and should be limited to large projects or circumstances where unusual cost or time constraints exist, unique technical or managerial expertise is required, and/or an increase in contracting agency staff is not a viable option.

(ii) Management support roles may include, but are not limited to, providing oversight of an element of a

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highway program, function, or service on behalf of the contracting agency or may involve managing or providing oversight of a project, series of projects, or the work of other consultants and contractors on behalf of the contracting agency. Contracting agency written policies and procedures as specified in § 172.5(c) may further define allowable management roles and services a consultant may provide, specific approval responsibilities, and associated controls necessary to ensure compliance with Federal requirements.

(iii) Use of consultants or subconsultants in management support roles requires appropriate conflicts of interest standards as specified in paragraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management consultant contract, as specified in § 172.9(d). A consultant serving in a management support role may be precluded from providing additional services on projects, activities, or contracts under its oversight due to potential conflicts of interest.

(iv) FAHP funds shall not participate in the costs of a consultant serving in a management support role where the consultant was not procured in accordance with Federal and State requirements, as specified in 23 CFR 1.9(a).

(v) Where benefiting more than a single Federal-aid project, allocability of consultant contract costs for services related to a management support role shall be distributed consistent with the cost principles applicable to the contracting agency, as specified in 2 CFR part 200, subpart E—Cost Principles.

§ 172.9 Contracts and administration.

(a) *Contract types.* The contracting agency shall use the following types of contracts:

(1) *Project-specific.* A contract between the contracting agency and consultant for the performance of services and defined scope of work related to a specific project or projects.

(2) *Multiphase.* A project-specific contract where the solicited services are divided into phases whereby the specific scope of work and associated costs may be negotiated and authorized by phase as the project progresses.

(3) *On-call or indefinite delivery/indefinite quantity (IDIQ).* A contract for the performance of services for a number of projects, under task or work orders issued on an as-needed or on-call basis, for an established contract period. The procurement of services to be performed under on-call or IDIQ contracts shall follow either competitive negotiation or small purchase procurement procedures, as specified in § 172.7. The solicitation and contract provisions shall address the following requirements:

(i) Specify a reasonable maximum length of contract period, including the number and period of any allowable contract extensions, which shall not exceed 5 years;

(ii) Specify a maximum total contract dollar amount that may be awarded under a contract;

(iii) Include a statement of work, requirements, specifications, or other description to define the general scope, complexity, and professional nature of the services; and

(iv) If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:

(A) Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and

(B) Specify the procedures the contracting agency will use in competing and awarding task or work orders among the selected, qualified consultants. Task or work orders shall not be competed and awarded among the selected, qualified consultants on the basis of costs under on-call or IDIQ contracts for services procured with competitive negotiation procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected, qualified consultants:

(1) Through an additional qualifications-based selection procedure, which may include, but does not require, a formal RFP in accordance with § 172.5(a)(1)(ii); or

(2) On a regional basis whereby the State is divided into regions and consultants are selected to provide on-call